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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

Norfolk and Western Railway Company,
a Corporation,

Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

REPLY BRIEF

HOWARD J. TRIENENS
SIDLEY & AUSTIN
Suite 4800
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

ROBERT L. LANDESS
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Attorneys for the Petitioner

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REPLY BRIEF

Introduction

The most noteworthy aspect of respondent's Brief in Opposition (Opposition) is that it does not seriously challenge any of the grounds petitioner has advanced in support of its application for certiorari.

First, and most significantly, the Opposition does not deny that there is, in cases brought under the FELA, a conflict among the state courts and among the federal courts both on the question whether income taxes should be deducted in computing a decedent's lost earnings and also on the question whether a court may refuse to advise a jury that a claimant's award will not be taxed. And apart from making the wholly

unrealistic claim that these federal questions are "insubstantial", respondent does not present any reasons why this Court should not resolve these conflicts. Indeed, by failing to deny either that the questions presented have enormous practical importance in large numbers of lawsuits filed each year or that most major suits will, until this Court acts, be filed and tried in those jurisdictions which follow the Illinois rules, *see* Petition for Certiorari at 17-18, the Opposition underscores that an authoritative national decision is urgently needed.

Second, the Opposition does not dispute that the Illinois courts' rulings required the jury to award respondent money that decedent would have paid out in taxes and encouraged it to inflate the verdict to compensate for an imagined tax and that, therefore, the decision below is not in accord with the well established rule that damages in a FELA action is to be the amount the claimant could reasonably have expected to have been applied to his benefit if the accident had not occurred. *See Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485 (1916); *Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U.S. 625, 629 (1915). Although the Opposition apparently is arguing that the damages rulings of the Illinois courts are correct, none of its specific arguments even address the standard for FELA damages prescribed in *Kelly* and *Holbrook*.[1]

For example, respondent's primary defense of the gross earnings test is that a deduction for the taxes the decedent would have paid somehow bestows a benefit on the wrongdoing defendant that Congress intended to confer upon the plaintiff. Opposition at 7-8. This argument simply ignores that the measure of damages under the FELA is the amount required to place a plaintiff in the same position he would

[1]Curiously, the case respondent relies upon, *Huddell* v. *Levin*, 395 F. Supp. 64 (D.C.N.J. 1975), involved state tort law, not the FELA.

have occupied had the accident never occurred. The cost to the defendant of providing the compensation necessarily is irrelevant, and the suggestion that a net earnings test could confer a benefit on a defendant is simply untenable.

Respondent's other arguments in defense of the rulings below were addressed in the Petition for Certiorari.

Although respondent's Opposition does not challenge the reasons petitioner advanced in support of granting certiorari, the Opposition makes two arguments which, if tenable, would affect this Court's decision. Neither, however, is remotely tenable.

I. Petitioner Has Properly Preserved Its Objection to the Gross Earnings Rule and This Case Squarely Presents that Question and All Its Variations.

Petitioner makes two interrelated arguments to the effect that petitioner's claim that the gross earnings test violates the FELA is somehow not before the Court.

First, it is contended that petitioner did not preserve its right to appellate review of this claim because it failed to show at trial, by way of a proper offer of proof, that the application of a net earnings rule would have resulted in a significant reduction in the size of the verdict. Although this contention is based on a misrepresentation of the trial record, the short answer to respondent is that the Illinois Appellate Court disposed of this federal question on the merits. *See* A22-23. This Court has repeatedly held that "there can be no question of the proper presentation of a federal claim when the highest state court [has] passe[d] on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *accord Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *see generally* R. Stern & E. Gressman, *Supreme Court Practice* ¶3.28, at 222–24 (5th Ed. 1978).

But even if the Court were to deviate from established principles and inquire into whether the point was preserved, respondent's argument would have to be rejected. The claim proceeds from the premise that there is no evidence in the record concerning the effect taxation would have had on petitioner's future earnings because the trial judge, in respondent's view, "*rejected* the offer of proof" concerning the testimony of Robert Barnes on the ground the offer lacked specificity. Opposition at 6–7 (emphasis supplied). This premise is simply false. The record unequivocably shows that, while the trial court kept from the jury Dr. Barnes' *testimony* on the authority of his earlier rulings concerning the treatment of income taxation, the trial judge accepted *the offer of proof, see* A35–36, regarding it as entirely adequate to preserve petitioner's claim.[2] In any case, respondent having made the same argument in the lower court, *see* Brief for Plaintiff—Appellee at 60, and the Illinois Appellate Court having nevertheless reached the merits, it is clear that it too regarded the offer of proof as fully adequate, and that respondent's assertion that the decision below rests on an independent adequate state procedural ground is frivolous.

Second, in a related vein, respondent maintains that petitioner may not rely upon those cases that require a deduction for income taxes only when taxation would have significantly reduced the amount of the wage earner's disposable income, *see Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 290 (9th Cir. 1975) (discussing cases), because her decedent would not have paid out a substantial amount of his income in taxes. Opposition at 4. This argument both

[2]The cases respondent cites—*Austin Liquor Mart, Inc.* v. *Dept. of Revenue*, 18 Ill. App. 3d 894, 906, 310 N.E. 2d 719 (1974); *Hession* v. *Liberty Asphalt Products, Inc.*, 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17 (1968)—are both cases in which the moving party had failed to attempt to make an offer of proof, so both are clearly inapposite.

ignores the record—which showed that respondent's decedent would have paid out $57,000 in taxes and that consideration of the effect of taxation would have reduced respondent's estimated pecuniary loss from $302,000 to some $115,000, *see* A35—and further misstates the law of those jurisdictions that follow this variation on a net earnings approach. These courts hold that inquiry into the effect of taxation is required whenever the projected annual earnings exceed $15,000 (and possibly whenever they exceed $11,500). *See Burlington Northern, Inc.* v. *Boxberger, supra*, at 290 (summarizing cases). Because Liepelt's *projected* (i.e. post-trial) earnings ranged from $16,800 to $36,000, the ruling below plainly would have been held erroneous by these net earnings jurisdictions.[3]

II. The Questions are Substantial

Although respondent repeatedly refers to petitioner's federal claims as being "insubstantial", such a characterization is preposterous. The federal questions petitioner has presented are neither devoid of merit nor plainly foreclosed by prior decisions of this Court. *See* R. Stern & E. Gressman, *supra*, ¶3.25, at 208. On the contrary, as numerous federal courts and several state courts have concluded, established federal principles of damages compel the adoption of petitioner's claims.

To the extent respondent is contending that there is no federal interest in the correct resolution of these questions, that argument is conclusively refuted by this Court's own actions. The single overriding issue in this case is whether the Illinois courts' ruling either required—by excluding all

[3]The Illinois Appellate Court, moreover, plainly recognized as much. If it had agreed with respondent's argument—which was made below, *See* Brief of Plaintiff—Appellee at 59–60—surely it would have decided the case on a narrow ground rather than aligning itself with the gross earnings jurisdictions.

evidence of the taxes decedent would have paid—or impermissibly encouraged—by refusing to instruct the jury that awards are tax free—a verdict which overcompensated respondent in violation of the established principle that FELA damages should be the amount the claimant lost as a result of the accident—and no more. *See Norfolk & Western Ry. Co.* v. *Holbrook*, *supra*. This Court has, in the past, required states to follow practices that will ensure that no such overcompensation occurs, *see Chesapeake & Ohio R. Co.* v. *Kelly*, *supra*, and these cases dispose of respondent's assertion that the *"content"* of FELA jury instructions are "matters of procedure" which may be governed by the Forum's law without threatening any federal interest. Opposition at 2, 7.

The grant of certiorari in *Rediker* v. *Chicago, Rock Island & Pacific R. Co.*, 1 Kan. App. 2d 581, 571 P. 2d 70 (1977), *cert granted*, 435 U.S. 922 (No. 77-1000), is a recent illustration of the point. Respondent's implication to the contrary notwithstanding, *Rediker* involved the identical statutory issues petitioner has submitted, this Court having there not limited its grant to a related constitutional issue which was referred to in that petition.[4]

[4]Contrary to respondent's assertion, petitioner is not claiming that *Rediker* "controls the Court's consideration of the instant petition." Opposition at 3. *Rediker* does show, however, the questions presented here were regarded by this Court as worthy of plenary consideration last term, and for the reasons set forth in the Petition in this case, these same questions are as much or more worthy of certiorari today.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

HOWARD J. TRIENENS
SIDLEY & AUSTIN
Suite 4800
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

ROBERT L. LANDESS
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE,
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